IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20-06-2007

CORAM

THE HONOURABLE MR.JUSTICE M.JAICHANDREN

Second Appeal No.1030 of 1996

Brammagiri .. Appellant/Appellant/
1st Defendant

Versus

1.Minor Sivasubramaniam ...1st Respondent/1st Respondent/
rep by guardian and next Plaintiff
friend Subbathal

2.Ayyasamy ... 2nd Respondents/2nd Respondent/
2nd Defendant

Appeal against the judgment and decree of the learned Principal District Judge, Coimbatore, dated 09.03.1994, in A.S.No.214 of 1993, confirming the judgment and decree of the learned Subordinate Judge, Tiruppur, dated 08.01.1993, in O.S.No.295 of 1989.

For Appellants : Mr.V.Nicholas

For Respondents : Mr.K.Rajeshwaran

J U D G M E N T

This second appeal has been filed against the judgment and decree passed by the Court of the Principal District Judge, Coimbatore, dated 09.03.1994, made in A.S.No.214 of 1993, confirming the judgment and decree passed by the Court of the Subordinate Judge, Tiruppur, dated 08.01.1993, made in O.S.No.295 of 1989.

2. The first defendant before the trial Court is the appellant in the present second appeal. The plaintiff had filed the suit in O.S.No.295 of 1989, on the file of the Court of the Subordinate Judge, Tiruppur, praying for the passing of a preliminary decree for partition of the suit schedule properties, by dividing the same into four equal shares and to allot one such share to the plaintiff and to put him in separate possession of the same and for the cost of the suit.

3. The brief facts of the case, as stated by the plaintiff in the suit, are as follows:

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The plaintiff is the minor son of the second defendant. The defendants are brothers. The properties described in the suit schedule are ancestral properties belonging to the joint family. The plaintiff is entitled to ¼ th share in the suit schedule properties. The second defendant had married the plaintiff's mother and they had two daughters, both of whom are elder to the plaintiff. The second defendant had deserted the plaintiff, his mother and sisters. Therefore, they were living at Naduppalayam with the plaintiff's maternal grand father. It had been further stated that the second defendant had executed two release deeds in favour of the first defendant, acting against the interest of the plaintiff. The release deeds are not for the benefit of the plaintiff, as he has not been made a nominee to the release deeds. The consideration mentioned in the documents are also not true, or correct. The second defendant is not entitled to release the properties, including the plaintiff's share. Since the release deeds, dated 12.12.1988 and 14.12.1988, are not genuine documents, they will not in any way bind the plaintiff and curtail his rights over the suit schedule properties. Even though the first item of the suit schedule property was purchased in the name of the plaintiff's paternal grand mother, since it was purchased from and out of the income from the ancestral joint family properties, the plaintiff is entitled to ¼ th share in both the items of the suit schedule properties. A legal notice had been issued on behalf of the plaintiff and the first defendant had issued a reply stating that the plaintiff is living along with the second defendant and the release deeds were made only for the benefit of the family. The statements made in the reply notice are false and devoid of merits. Hence the plaintiff had filed the suit for partition and separate possession of his ¼ th share.

4. The brief averments in the written statement filed by the first respondent are as follows:

The first respondent does not admit any of the allegations contained in the plaint, except those which were specifically admitted. The statements made by the plaintiff are deliberate, falsehood, mischievous and misleading. The claim of the plaintiff that the first item of the suit schedule property was purchased in the name of the plaintiff's paternal grandmother, from and out of the income of the ancestral joint family properties is false. It had also been stated that the plaintiff, his mother, the second defendant and the plaintiff's sisters are all living together happily and peacefully at Thalingikkadu Thottam, Pappampatti Village, Palladam Taluk. They are not residing at Naduppalayam with the maternal grand father as stated in the plaint. There was no misunderstanding amongst them and it is not true to state that the second defendant had deserted the plaintiff, his mother and the sisters. It is only for the purpose of filing the present suit, the plaintiff had made such allegations with ulterior motives. The first item of the suit schedule property has not been purchased from and out of the income of the joint family ancestral properties and it has been purchased only out of the hard earned money of the defendants mother. Only

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after receiving a huge amount of money, as consideration, the second defendant had executed two separate registered release deeds in favour of the first defendant, dated 12.12.1988 and 14.12.1988, as document Nos.2715 and 2865 of 1988, respectively. The entire consideration had been utilised and spent only for the welfare and advantage of the entire family. By virtue of the release deeds, the first defendant had become the absolute and exclusive owner of the entire suit schedule properties. When the second defendant had no right, title or interest over the properties, the plaintiff who claims right through the second defendant, cannot have any claim or right over the suit schedule properties. Since the plaintiff is not having any right, title, or interest in the suit schedule properties, there is no need to implead him as a party, or nominee in the release deeds. Therefore, the plaintiff is not entitled to any share in the suit schedule properties. It had been further stated that a bare suit for partition, without seeking the relief of cancellation, or setting aside of the release deeds, is not maintainable and it is liable to be dismissed in limine. The plaintiff cannot maintain the suit as a co-owner, or a co-sharer of the suit schedule properties. Further, there is no cause of action for the suit and therefore, the suit filed by the plaintiff is not maintainable.

5. Based on the rival claims made by the plaintiff, as well as the defendants, the trial Court had framed the following issues for consideration:

i) Whether the first item of the plaint schedule properties is a joint family property?

ii) Whether the release deeds by the second defendant is binding on the plaintiff?

iii) Whether the plaintiff is entitled to partition? If so, what share he is entitled to?

iv) What other reliefs the plaintiff is entitled to?

6. Based on the statements contained in Ex.A-1, the trial Court had come to the conclusion that the first item of the suit schedule property belonged exclusively, to Deivanaiammal, the mother of the defendants and therefore, the trial Court had come to the conclusion that the plaintiff is not entitled to any share in the first item of the suit schedule properties. It was also held that the release deed, dated 12.12.1988, marked as Ex.A-1, executed by the second defendant and his sisters in favour of the first defendant is valid in law. The trial Court had found that the second item of the plaint schedule property was an ancestral property belonging to the defendants and their father. Therefore, the plaintiff was entitled to only 1/6th share in the said property. In such circumstances, the plaintiff is entitled to partition and separate possession of 1/6 th share of the second item of the suit schedule property.

7. Aggrieved by the judgment and decree of the trial Court, dated 08.01.1993, made in O.S.No.295 of 1989, the first defendant had filed an appeal before the Principal District Judge, Coimbatore. Based on the averments made on behalf of the plaintiff, as well as

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the defendants and also based on the records available, the lower Appellate Court had framed the following points for consideration:

"1. Whether the second item of the suit schedule property is a joint family property?

2. Whether the plaintiff is entitled to the relief of partition with regard to the second item of the suit schedule property?."

While answering the points for consideration, the lower appellate Court had confirmed the findings of the trial Court and dismissed the appeal.

8. The present second appeal has been filed by the first defendant, who was the appellant before the lower Appellate Court. The second appeal has been filed on various grounds stated in the memorandum of the grounds of appeal. It has been stated inter alia, that the Courts below had failed to see that the materials on record had clearly established that the sisters, mother and father of the plaintiff were all living together at Thalingikkadu Thottam, Pappampatti Village, Palladam Taluk. The suit had been filed by the plaintiff on the instigation of the second defendant with the ulterior motive of defeating the valuable rights of the first defendant in the suit schedule properties. The courts below had failed to see that the second defendant had never deserted the plaintiff at any point of time and the allegations in the plaint have been invented only for the purpose of filing of the suit. The Courts below had failed to see that the second defendant had released his rights in the suit schedule properties in favour of the first defendant only after receiving due consideration. The suit for partition, without a relief for setting aside the release deeds, was not maintainable in law. The plaintiff cannot be construed as a co-owner or a co-sharer and therefore, the suit is unsustainable in law. Since the release had been executed by the second defendant as the kartha and manager of the Hindu joint family, he had the right to execute such a document, so as to make it valid and binding upon the plaintiff, who was a minor. The Courts below had failed to see that the suit valued under Section 37(2) of the Tamilnadu Court fees and valuation Act is not correct, as the plaintiff ought to have valued the suit under Section 37(1) of the Act.

9. The second appeal had been admitted on the following substantial questions of law:

"1. When the plaintiff is disputing the right of the 2nd defendant to execute a release deed in favour of the 1st defendant whether the present suit for partition without seeking to set aside the said release deed is maintainable in law?

2. When the plaintiff failed to discharge his burden to prove that the suit II item is an ancestral property or joint family property whether the Courts below are correct in granting the relief of the plaintiff in respect of the said item?

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10. Learned counsel appearing on behalf of the appellant had reiterated the stand taken by the first defendant in his written statement filed before the trial Court in O.S.No.295 of 1989. He had submitted that the Courts below had not appreciated the oral and documentary evidence available before them in their proper perspective. It was contended that the plaintiff had filed the suit in collusion with the second defendant with an ulterior motive of defeating the valuable rights of the appellant in the second appeal. It was also contended that the release deeds, dated 12.12.1988 and 14.12.1988, had been executed by the second defendant after receiving due consideration. It was also contended that the plaintiff could not be construed as a co-owner, or a co-sharer in the suit schedule properties and that the suit for partition without a relief for setting aside the documents of release is not maintainable in law.

11. Learned counsel appearing on behalf of the respondents had submitted that the Courts below had come to the right conclusion after due appreciation of the oral and documentary evidence available on record. The Courts below had rightly held that the plaintiff is entitled to 1/6 th share of the second item of the suit schedule property.

12. The trial Court as well as the first appellate Court had found that the second item of the suit schedule property was a joint family property and that the plaintiff was entitled to 1/6th share in the suit property. In view of the findings of the courts below, the relief claimed by the plaintiff for partition is maintainable and the findings of the Courts below that the plaintiff is entitled to 1/6th share of the second item of the suit schedule property is right in law. As rightly held by the Courts below, the plaintiff had sufficiently proved his rights over the second item of the suit schedule property.

13. The lower appellate Court, while confirming the judgment and decree of the trial Court, had held that the first item of the suit schedule property belonged to Deivanaiammal as separate property and therefore, the plaintiff was not entitled to any share in it. With regard to the second item of the suit schedule property, it was held that the plaintiff is entitled to 1/6th share in the said property as it belonged to the family of the defendants as an ancestral property and that the second defendant could not execute the release deed with regard to it without the permission of the Court.

14. The lower appellate Court had also found that the second defendant and his sisters had executed a release deed in favour of the first defendant without including the plaintiff, who was a minor, as a party. In law, prior permission ought to have been obtained from the Court before dealing with a property that belonged to a minor. It was found that the second defendant had not obtained such a permission with regard to the second item of the suit schedule property. It was also found that it was not mentioned in the release deed that the second defendant had executed the said document as a manager or the kartha of the joint family properties. Further, it

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had not been stated that the release deed was executed for the benefit of the family or due to necessity or to repay the family loans. Since the release deed, marked as Exhibit A.2, cannot be said to be binding on the plaintiff, it was held that he was entitled to the relief of partition and separate possession of 1/6th share of the second item of the suit schedule property. Thus, the first appeal, was dismissed by the judgment and decree of the lower appellate Court, dated 09.03.1994 in A.S.No.214 of 1993, confirming the judgment and decree of the learned Subordinate Judge, Tiruppur, dated 08.01.1993, in O.S.No.295 of 1989.

15. In view of the findings of the Courts below, it is clear that the release deed, marked as Exhibit A.2, dated 14.12.1988, cannot be held to be binding on the plaintiff as no prior permission had been obtained from the concerned Court before it was executed by the second defendant.

16. In view of such findings by the Courts below, it was held that the plaintiff is entitled to 1/6th share of the second item of the suit schedule property. Once when the release deed executed by the second defendant was held to be not binding on the plaintiff, as the second defendant did not possess the right to execute the release deed in favour of the first defendant, the substantial question of law raised in the second appeal is answered in favour of the plaintiff holding that the suit instituted by the plaintiff is maintainable in law.

17. While both Courts below have found that the second item of the suit schedule property is an ancestral joint family property, based on the oral and documentary evidence available on record, it is not open to the appellant herein to contend that the plaintiff had failed to discharge his burden proving that the said property is an ancestral joint family property.

18. Appreciation of evidence by the Courts below and the findings of the Courts below based on such appreciation of evidence cannot, normally, be a substantial question of law before this Court in the second appeal as held by the Supreme Court in its recent judgment in GURDEV KAUR AND OTHERS Vs. KAKI AND OTHERS (2007 (1) CTC 334).

19. On analysing the rival contentions made on behalf of the parties concerned and on a perusal of the records available, this Court is of the considered view that the Courts below had come to the right conclusion, based on available evidence, that the plaintiff is entitled to 1/6 th share of the second item of the suit schedule property.

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20. In such circumstances, the appellant has not shown sufficient cause or reason for this Court to interfere with the findings of the Courts below. In such view of the matter, the second appeal stands dismissed, confirming the judgment and decree of the Courts below. No costs.

csh/lan

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Principal District Judge,
Coimbatore.

2. The Subordinate Judge,
Tiruppur.

3. The Section Officer,
VR Records,
High Court, Madras.

+ 1 cc to Mr. V. Nicholas, Advocate SR No. 36616

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